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No. 89-323

In the Supreme Court of the United States

OCTOBER TERM, 1989

WELEX, A DIVISION OF HALLIBURTON COMPANY, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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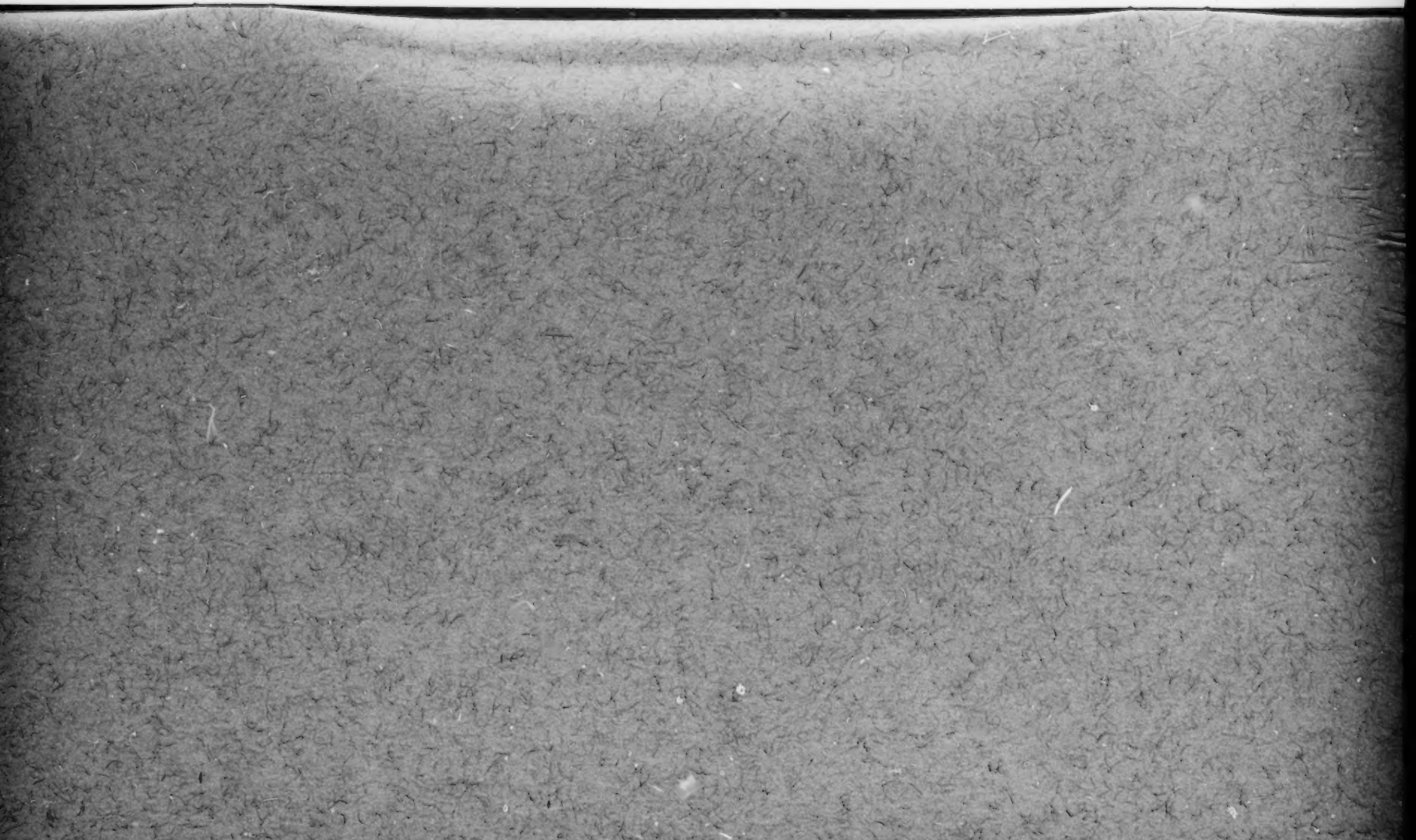

QUESTIONS PRESENTED

1. Whether respondent's motion to obtain restitutionary and prospective injunctive relief instead of the monetary relief awarded by the district court was properly characterized as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e).

2. Whether the court of appeals properly dismissed petitioner's appeal pursuant to Fed. R. App. P. 4(a)(4) because petitioner failed to file a notice of appeal after the district court denied respondent's motion to alter or amend the judgment.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing the appeal (Pet. App. 26a) is unreported. The district court's 1982 order on cross-motions for partial summary judgment (App., *infra*, 21a), its November 29, 1988 final judgment (App., *infra*, 12a), and its December 16, 1988 memorandum and order denying respondent's motion to amend the judgment (Pet. App. 16a-17a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1989. A motion for reconsideration was denied on June 2, 1989 (Pet. App. 27a). The petition for a writ of certiorari was filed on August 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Labor filed this action to enjoin petitioner from violating the overtime compensation provisions of the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 201 *et seq.* Jurisdiction was alleged under Section 17 of the Act, 29 U.S.C. 217, which authorizes district courts "to restrain violations of Section 215 of this title, including * * * the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees." The Secretary alleged that petitioner had violated 29 U.S.C. 207 and 215(a)(2) by failing to pay certain employees for hours in excess of forty hours a week at a rate not less than one and one-half times their regular rate of pay. In its prayer for relief, the complaint specifically requested a permanent injunction against violation of these overtime pay provisions and "the restraint of withholding of payment of overtime compensation found by the court to be due employees under the Act," plus interest thereon. Complaint, Civ. Action No. V-79-19 (S.D. Tex. Sept. 17, 1979).

In its defense, petitioner argued that its pay plan fell within the so-called "*Belo*" exception to the Act's overtime compensation requirements, an exception derived from *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942), and now codified at 29 U.S.C. 207(f). The district court held the *Belo* exception inapplicable, granting partial summary judgment to the Secretary on that issue in an order filed August 25, 1982 (App., *infra*, 2a). A bench trial then was held on November 22, 1988, focusing primarily on the issue of willfulness. See *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. 1677 (1988); 29 U.S.C. 255(a). The court ruled from the bench that the violation was not willful (Tr. 58), and ordered petitioner to make "pass-due [sic] overtime payments of $120,667.47, which is the stipulated

figures for the two years back on the statute of limitation under the non willful, non reckless standard to the stipulated employees." Tr. 60-61.

On November 29, 1988, the district court entered final judgment for the Secretary, directing that she recover from petitioner for the benefit of 91 employees specified amounts of principal, prejudgment interest, and post-judgment interest (App., *infra,* 1a). On December 5, 1988, petitioner filed a notice of appeal in district court. Pet. App. 5a-7a; Pet. 2. One day later, on December 6, 1988, the Secretary filed a timely motion to alter or amend the judgment. Pet. App. 8a-15a; Pet. 2. Expressly relying on Rule 59(e), the Secretary argued that the court had erred both by entering a money judgment rather than a restitutionary injunction and by failing to enjoin petitioner permanently from violating the overtime provisions of the Act. Pet. App. 12a-14a.[1] By an order signed on December 13, 1988 and entered on December 16, 1988, the district court denied the Secretary's motion to amend the judgment (*id.* at 16a), explaining that "[t]he granting of only the compensatory monetary relief in the final judgment implicitly but unequivocally denied the other relief the Secretary of Labor requested," and that "injunctive relief was unsupported by any evidence of current practices or intentions." *Id.* at 17a.

2. After the district court denied the Secretary's Rule 59(e) motion, petitioner did not file a new notice of appeal. It did, however, file two other documents with the court of appeals, both dated December 13 and filed December 18, 1988. Pet. App. 18a, 20a; Pet. 2. One was a

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[1] Although the Secretary's motion twice referred erroneously to a date of June 13, 1988 as the date of the judgment (Pet. App. 8a, 12a), it also correctly referred to November 29, 1988 as the date of the judgment. *Id.* at 13a.

letter referencing the parties and district court civil action number and enclosing a receipt for payment of the filing fee to the district court as required by Fed. R. App. P. 3(e). Pet. App. 18a-19a. The other was a letter, again referencing the caption of the case below, and enclosing the Fifth Circuit's "Form for Appearance of Counsel," which identified Weiex as appellant and the Secretary of Labor as appellee. Pet. App. 21a-25a. Neither letter designated the "judgment, order or part thereof appealed from" (Fed. R. App. P. 3(c)) either by date or by description.

Accordingly, on March 16, 1989, the Secretary moved to dismiss the appeal on the ground that petitioner had failed to file a notice of appeal, as required by Fed. R. App. P. 4(a)(1) and (4), within 60 days of the district court's order denying the Secretary's motion to alter or amend the judgment. The Secretary emphasized that this requirement is jurisdictional under *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 60-61 (1982) (per curiam). The court of appeals summarily dismissed the appeal, over petitioner's opposition. Pet. App. 26a; Pet. 3. Petitioner filed a motion for reconsideration, arguing for the first time that its December 18 filings with the court of appeals satisfied the requirements for a notice of appeal under Fed. R. App. 3(c). Pet. 3. That motion was denied. Pet. App. 27a.

ARGUMENT

The summary decision of the court of appeals to dismiss this appeal is correct and applies well-established principles to the particular facts of this case.

1. Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that, where any party files a timely motion in district court to alter or amend a judgment under Rule 59, Fed. R. Civ. P., "the time for appeal for all parties

shall run from the entry of the order" disposing of that motion. Rule 4(a)(4) (emphasis added) stipulates:

> A notice of appeal filed before the disposition of any of the above motions *shall have no effect.* A new notice of appeal *must be filed* within the prescribed time measured from the entry of the order disposing of the motion * * *.

This unequivocal language, added by the 1979 amendments to the Federal Rules of Appellate Procedure, was designed to "make it clear" that, when a notice of appeal is filed before one of the specified post-trial motions, "the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of." Fed. R. App. P. 4(a)(4), notes of advisory committee on appellate rules (1979 Amendment) (28 U.S.C. App. at 469).

As this Court has held, "the post-1979 effect of a Rule 59 motion on a previously filed notice of appeal" is that " '[t]he appeal simply self-destructs.' " *Griggs* v. *Provident Consumer Discount Co.,* 459 U.S. at 61 (quoting 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* ¶ 204.12[1], at 4-65 n.17 (2d ed. 1982)). Under these circumstances, a previously filed notice of appeal has " 'no effect' " and is simply "a nullity." *Griggs,* 459 U.S. at 61. Because a timely notice of appeal is both mandatory and jurisdictional, without such a timely notice, the court of appeals has no jurisdiction to act. *Ibid.*

2. Petitioner recognizes that, under Rule 4(a)(4), a timely Rule 59(e) motion nullifies a previously filed notice of appeal. Pet. 3, 5. However, petitioner seeks to escape the consequences of neglecting to file a second notice of appeal by asking this Court to recharacterize both respondent's motion to alter and amend and its own appellate filings. These efforts are unpersuasive.

a. Petitioner argues (Pet. 7-9) that the Secretary's post-judgment motion, although clearly denominated a Rule 59(e) motion to alter or amend the judgment, was in reality a motion under Fed. R. Civ. P. 60(a) to correct the district court's clerical error in failing to "memorialize" part of its decision. Rule 60 motions, unlike 59(e) motions, do not affect the finality of a judgment for purposes of appeal, and do not nullify a previously filed notice of appeal under Fed. R. App. P. 4(a)(4). *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F.2d 665, 666 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986); 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice*, ¶ 204.12[1], at 4-79, 4-82 (2d ed. 1989). Rather, clerical mistakes may be corrected during the pendency of an appeal under specified conditions. See Fed. R. Civ. P. 60(a).

Petitioner's attempt to recast the Secretary's post-judgment motion is unavailing. The Secretary filed a Rule 59(e) motion to effect a substantive change in the judgment: to convert it from a money judgment to a judgment providing both a restitutionary injunction and a prospective injunction against future violations of the FLSA's overtime provisions. Pet. App. 8a, 12a-14a. A restitutionary injunction, providing for the restraint of any withholding of payment of past due overtime wages is, unlike a money judgment, enforceable through the court's contempt power. *Usery* v. *Fisher*, 565 F.2d 137 (10th Cir. 1977). A prospective injunction, of course, provides a ready remedy for future statutory violations. See, *e.g.*, *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944). The Secretary's motion, therefore, plainly sought significant and material changes in the remedy awarded by the district court for petitioner's violations of the FLSA, and thus was properly characterized by the Secretary and both courts below as a motion to alter or amend the judgment.

Moreover, because the motion involved a " 'reconsideration of matters properly encompassed in a decision on the merits' " (*Osterneck* v. *Ernst & Whinney,* 109 S. Ct. 987, 990 (1989), quoting *White* v. *New Hampshire Dep't of Employment Sec.,* 455 U.S. 445, 451 (1982)), it was properly filed as a Rule 59(e) motion to amend the judgment. Certainly the injunctive relief sought by the Secretary here was at least as closely related to full relief on the merits as was the prejudgment interest at issue in *Osterneck,* which the Court held was properly sought under Rule 59(e). Compare *Buchanan* v. *Stanships, Inc.,* 108 S. Ct. 1130 (1988) (per curiam) (motion for costs under Fed. R. Civ. P. 54(d) is collateral matter, not Rule 59(e) motion); *White* v. *New Hampshire Dep't of Employment Sec., supra* (motion for attorneys' fees is not Rule 59(e) motion).

Petitioner argues, however, that the Secretary's motion should have been treated as a Rule 60(a) motion because it purportedly asked the court simply to memorialize part of the ruling inadvertently omitted from its decision, as in *Miller* v. *Trans American Press, Inc.,* 709 F.2d 524, 527-528 (9th Cir. 1983). This argument is not plausible. The court in *Miller* explicitly distinguished the kind of "clerical error" (*id.* at 527) it perceived in that case from a request for a "substantive change of mind by the court" (*ibid.*) that must be characterized as a Rule 59(e) motion. Here, the Secretary unquestionably was requesting a "substantive change of mind by the court." Indeed, the Secretary's motion asked the court to *change* a monetary award to a restitutionary injunction, as well as to add a prospective injunction to the existing judgment. And the district court confirmed, in denying the Secretary's motion, that it had not inadvertently omitted injunctive relief, but that its prior order "implicitly but unequivocally" denied such relief. Pet. App. 17a. A motion to alter or amend was the

appropriate vehicle by which to challenge the correctness of the court's order limiting relief. Accordingly, the court of appeals properly characterized this motion as a Rule 59(e) motion to alter or amend the judgment.

b. Petitioner also contends (Pet. 4-7) that its two December 18 letters to the court of appeals—one including a form for appearance of counsel and the other a notice of payment of filing fee—constituted a valid second notice of appeal pursuant to Fed. R. App. P. 3(c). That rule requires that a notice of appeal "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." The rule also states that an appeal "shall not be dismissed for informality of form or title of the notice of appeal." Petitioner, focusing on this last sentence of Rule 3(c), describes its errors as "mistakes of mere form" which should not be fatal to its appeal. Pet. 4-5.

In fact, however, petitioner's December 18 filings demonstrate a more serious defect than mere form because they fail to designate the judgment appealed from as mandated by Rule 3(c). The substantive requirements for the content of a notice of appeal are jurisdictional in nature. See *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 (1988) ("construing Rule 3(c) as a jurisdictional prerequisite" and affirming dismissal of appeal by party whose name was inadvertently omitted from notice of appeal). See also *Osterneck*, 109 S. Ct. at 989 (noting "the vital fact" that respondent was omitted from the notice of appeal). Even if petitioner's appearance of counsel form is viewed as satisfying the first requirement of Rule 3(c) by "specify[ing] the party * * * taking the appeal" and the third requirement by "nam[ing] the court to which the appeal is taken," petitioner's December 18 filings did not meet Rule 3(c)'s second requirement that the notice of

appeal "shall designate the judgment, order or part thereof appealed from." As described above (pp. 2-3, *supra*), the district court had entered at least three separate orders or judgments in this case on different dates. Thus, mere recitation of the case caption did not adequately identify the "judgment, order or part thereof appealed from," as the rule requires. Accordingly, the December 18 filings relied on by petitioner were insufficient to constitute a new notice of appeal conferring jurisdiction on the court of appeals.[2]

Petitioner contends (Pet. 5-6) that the Fifth Circuit's decisions regarding the requirements of a notice of appeal are inconsistent with one another. However, neither in this case nor in any other case has the Fifth Circuit agreed that its decisions present an intra-circuit conflict. Instead, the Fifth Circuit has determined that the very decisions that petitioner claims are in conflict are actually in harmony.[3] See, *e.g.*, *Van Wyk El Paso Inv., Inc.* v. *Dollar Rent-A-Car Systems, Inc.*, 719 F.2d 806, 807-808 (5th Cir. 1983) (per curiam) ("We hold that even under the liberal constructions accorded the documents filed in *Cobb* [v. *Lewis*, 488 F.2d 41 (5th Cir. 1974)] and *Stevens* [v. *Heard*, 674 F.2d 320 (5th Cir. 1982) (per curiam)], Dollar Rent-A-Car has failed to give a timely notice of appeal."). Compare Pet. 5-6 (asserting that *Van Wyk* is in conflict with *Cobb* and *Stevens*).

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[2] In contrast to petitioner's December 18 submissions, Form 1 in the Appendix of Forms to the Federal Rules of Appellate Procedure, which is specifically referenced in Rule 3(c) as "a suggested form of a notice of appeal," calls for the appellant to specify that its appeal is from either a "final judgment" or from an "order (describing it)" and to note the date on which the judgment or order was entered.

[3] In any event, an intra-circuit conflict provides no basis for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioner also suggests that the District of Columbia Circuit "has taken a different view" (Pet. 6) from the Fifth Circuit. That contention is without merit. Both courts recognize that, when a notice of appeal has been nullified under Rule 4(a)(4), Rule 3(c) applies as if no notice of appeal had been filed at all. *Van Wyk El Paso Inv., Inc.*, 719 F.2d at 807; *Nichols* v. *Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 888 (D.C. Cir. 1987). Moreover, both circuits recognize that the timely filing of a document will satisfy the requirements of Rule 3(c) as long as it accomplishes the three notice requirements of that rule. *Van Wyk El Paso Inv., Inc.*, 719 F.2d at 807; *Nichols*, 835 F.2d at 889. See also *Page* v. *DeLaune*, 837 F.2d 233, 236 (5th Cir. 1988) (filing of designation of record on appeal and timely service of notice of appeal on opponent satisfy Rule 3(c)).

Whether the notice requirements of Rule 3(c) have been met in a particular case is largely a factual question. Thus, in *Nichols*, the D.C. Circuit held that a certificate filed by appellants under Fed. R. App. P. 10(b)(1) "contain[ed] the data Federal Appellate Rule 3(c) necessitates for an efficacious notice of appeal" (835 F.2d at 888 (footnote omitted)) because, in addition to identifying the parties bringing the appeal and the court in which appellate review was sought, it adequately identified the judgment appealed from by describing it as the decision on cross-motions for summary judgment. *Id.* at 889. In *Van Wyk*, by contrast, the Fifth Circuit held that a form for appearance of counsel did not satisfy Rule 3(c) because it failed to indicate whether the party was appellant or appellee and did not refer to the order or judgment it intended to appeal. 719 F.2d at 808. In this case, similarly, the notice of appeal lacked the specificity about the "judg-

ment, order, or part thereof appealed from" which the D.C. Circuit explicitly found in *Nichols*.[4]

In sum, there is no conflict in the circuits and no reason for this Court to review the court of appeals' application of established principles to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989

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[4] See also *Page* v. *DeLaune*, 837 F.2d at 236 (reviewing cases in which Fifth Circuit has found particular filings to be valid notices of appeal); *Greater Houston Chapter of ACLU* v. *Eckels*, 763 F.2d 180 (5th Cir.) (appeal information sheet fails to designate judgment, order, or part appealed from under Rule 3(c) and is not valid notice of appeal), cert. denied, 474 U.S. 980 (1985); *Alamo Chem. Transp. Co.* v. *M/V Overseas Valdes*, 744 F.2d 22 (5th Cir. 1984) (motion for enlargement of time to file appellate brief is not valid notice of appeal); *Florida Women's Medical Clinic, Inc.* v. *Smith*, 706 F.2d 1172 (11th Cir. 1983) (appellate brief is not valid notice of appeal).

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

Civil Action No. V-79-19

ANN MCLAUGHLIN, SECRETARY OF LABOR, PLAINTIFF

VS.

WELEX, DEFENDANT

[Filed Nov. 29, 1988]

FINAL JUDGMENT

It is adjudged that Ann McLaughlin, Secretary of the Department of Labor, recover from Welex for the benefit of the ninety-one employees in the class covered by the period October 1, 1977 through January 31, 1980:

A. $102,662.47 in principal;
B. $82,365.59 in prejudgment interest from January 1, 1980, at 9% per annum; and
C. postjudgment interest at 8.55% per annum.

Signed on November 22, 1988, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

Civil Action No. V-79-19

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

VS.

WELEX, A DIVISION OF THE HALLIBURTON CORPORATION,
DEFENDANT

[Filed Aug. 25, 1982]

ORDER

The Secretary of Labor (hereinafter "Secretary") brings suit to enjoin Welex Company, a division of the Halliburton Corporation, from allegedly violating the provisions of the Fair Labor Standards Act (hereinafter "FLSA"), as amended, 29 U.S.C. §§ 201, *et seq.*, and to restrain Welex from withholding payment of overtime compensation allegedly due its employees. Pending before the Court are cross-motions for partial summary judgment filed by Plaintiff and Defendant. Rule 56, Fed. R. Civ. P.

The FLSA requires employers to pay time and one-half an employee's regular rate of pay for all hours worked in

excess of forty in any workweek. The Act excepts, *inter alia*, pay plans pursuant to so-called "*Belo* contracts". Judicially recognized in *Walling* v. *A. H. Belo Corporation*, 316 U.S. 624 (1942) and *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17 (1947), the exception was codified in 1949 at § 7(f) of the Act. 29 U.S.C. § 207(f). The *Belo* contract exception permits "an employer [to] pay his employees who work different hours each week a fixed guaranteed weekly salary, thus assuring employees stability of income and employment. The contracts may be used only if the duties of the employees necessitate irregular hours of work." *Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d 653, 655 n.3 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968), *quoting*, 95 CONG. REC. A5475 (1949). To qualify for this exception, employers must meet certain statutory prerequisites. The only prerequisite at issue in this case is whether the duties of Welex employees "necessitate irregular hours of work". *See* 29 U.S.C. § 207(f). For reasons stated below, the Court is of the opinion that Defendant fails to meet this condition and thus cannot invoke the *Belo* exception. Accordingly, Plaintiff's motion for partial summary judgment will be granted and Defendant's motion for partial summary judgment will be denied.

A motion for summary judgment shall be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.; *Keiser* v. *Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980). The movant has the burden of proof, and any doubt as to the existence of material fact must be resolved against the moving party. *Id.* at 410. Further, exceptions to the FLSA are "to be narrowly construed against the employer as-

serting them." *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 153 (5th Cir. 1982); *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Wirtz* v. *Jernigan*, 405 F.2d 155, 158 (5th Cir. 1968). That precept applies to *Belo* plans, which qualify the Act's overtime provisions. *Id.* An employer who attempts to invoke the *Belo* exception "has the burden of showing affirmatively that each of the essential conditions to the exception are met." *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d at 153; *Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d at 656 n. 4.

It is undisputed that the hours of Defendant's employees fluctuated in the overtime (over 40) range. The Fifth Circuit has conclusively held that if the fluctuation of hours in an employee's average workweek varies only in overtime hours, there is insufficient irregularity of hours to come within the *Belo* exception. Specifically,

> " 'irregular hours of work,' does not mean merely a fluctuating long workweek, consisting only or mostly of variations in the hours required over forty. For hours to be considered irregular within the meaning of section 7(f), they must, in a significant number of weeks, fluctuate both below forty hours per week as well as above, and *the fluctuation below must result from work requirements, not vacations, holidays, illness or reasons personal to the employees.*" (emphasis added).

Donovan v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d at 154 (footnote and citations omitted); *Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d at 661; *Harp* v. *Continental/Moss-Gordin Gin Company*, 259 F. Supp. 198, 200 (M.D. Ala. 1966), *aff'd*, 386 F.2d 995 (5th Cir. 1967) (per curiam).

The sole issue in this case is whether the fluctuations below 40 hours per week resulting from work requirements were sufficient to constitute "irregular hours of work" within the meaning of § 7(f). The Government argues that the number of fluctuations below 40 hours were very few. It submitted an affidavit of Sammy Eugene Ray, a compliance officer with the U.S. Department of Labor. Mr. Ray states he analyzed the payroll records of Welex employees for the years 1977, 1978 and 1979. He further states that in order to determine how many workweeks fluctuated below forty hours due to work requirements, as mandated by the above cited authorities, he excluded workweeks fluctuating below forty hours due to initial and terminal weeks, vacation, illness or sick leave, holidays or bonus days off. Those exclusions are not challenged by the Defendant. What forms the basis for the present dispute is that the Government's calculations also excluded "scheduled days off." The parties have stipulated that the employees in question "are scheduled to be available for work five days per week with two days off. unless required to work more than five days because of customer-requirements." Fact Stipulation No. 10, Pre-Trial Order. Excluding weeks with scheduled days off, Mr. Ray concludes that out of 150 weeks below forty in 1977, only in one week or .01% of the weeks could the fluctuation be due to work requirements. Out of 388 weeks below forty in 1978, none or 0% could be so explained. Finally, out of 643 weeks in 1979, only two weeks or .01% of the total weeks could the fluctuation be considered due to work requirements. In other words, all but three weeks over a three-year period reflect a fluctuation of hours worked below forty which were not attributable to typical personal leaves (*e.g.*, vacation, illness, etc.).

Defendant asserts that its employees fluctuated below 40 hours in considerably more weeks than those calculated

by the Government. It submitted an affidavit from Stan Patterson, Senior Personnel Analyst at Halliburton Services at Duncan, Oklahoma. Mr. Patterson states that he analyzed the payroll records of Welex's employees for the same period covered by Mr. Ray, and prepared schedules showing the number of workweeks that fluctuated below 40 hours due to work requirements. Mr. Patterson's Schedule C, which, like Mr. Ray's schedule, was calculated in the manner specified by the *Brown* decision, indicates that 16.3% of workweeks were under 40 hours during 1977-1981. The yearly percentages shown were 5.9% in 1977, 12.8% in 1978, and 30.8% in 1979.[1] The significant difference between Mr. Patterson's calculations and schedules and those prepared by Mr. Ray is, as suggested earlier, that Mr. Ray has excluded any week under 40 hours in which an employee was allowed his scheduled two days off. To decide which schedule is correct, therefore, the Court must determine whether those weeks must be included in the calculation of irregularity of non-overtime hours necessary for the valid use of a *Belo* plan.

For fluctuations below 40 hours to be considered irregular within the meaning of the *Belo* and *Halliburton* exceptions, the employees must be required to work less than 40 hours because of an unpredictable irregularity inherent in the nature of their duties. *See Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d at 656 n.5. This is because one of the basic purposes of the exception is to protect employees against "short" paychecks due to a shortage or unavailability of work resulting in weeks of substantially fewer than forty

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[1] Patterson's yearly figures were the percentage of *net* workweeks (which excluded weeks under 40 hours due to initial and terminal weeks, illness and injury, vacations, etc.). As a percentage of *total* workweeks, Mr. Patterson's yearly percentages total 5.3% in 1977, 10.65% in 1978, and 26.5% in 1979.

work hours. *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d at 154. In *Brown*, the court specifically stated that "days off" given at the employer's discretion were not work-related and were not the type of "irregularity" contemplated by the statute. *Id.* at 154. Defendant recognizes that the critical difference between its approach and that of the Plaintiff concerns the handling of those weeks where the employees were allowed to take their regularly scheduled two days off. Calling Plaintiff's position "absurd," Defendant strenuously argues that the Plaintiff would force employees to work a seven-day week before any employer would be "entitled to use a *Belo* contract". While superficially appealing, Defendant's argument misses the point. As stated above, the *Belo* contract is not an entitlement for the employer. Rather it is an exception to be narrowly construed. It is designed to cover a situation where because of the inherent nature of the job, an employee's work hours are "irregular", fluctuating between overtime weeks and short weeks. Implicit in Fifth Circuit decisions on the subject is the proposition that this fluctuation must be beyond the employer's control. *See Harp* v. *Continental/Moss-Gordin Gin Company, Inc.*, 259 F. Supp. 198, 200 (M.D. Ala. 1966), *aff'd* (per curiam), 386 F.2d 995 (5th Cir. 1967). In this case, it is undisputed that the scheduled days off are regularly assigned on a repeating three-week schedule, and the days off include all days of the week. There is no evidence and no contention that these days off are scheduled because of the absence of available work on those days. While these days off may indeed be an "enlightened employment practice", they are not the type of irregularity contemplated by the statute. *Brown*, 666 F.2d at 154. Indeed, adoption of the Defendant's argument could enable an employer to effectively manipulate "irregularity". For example, an employer could schedule days off during busy days some

weeks and then schedule the days off during slower days in other weeks, while requiring overtime work during the busy days.

Defendant's reliance on *Boll* v. *Federal Reserve Bank of St. Louis*, 365 F. Supp. 637 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (8th Cir. 1974) is misplaced. In that case, a federal bank examiner was held to be properly paid under a *Belo* contract because of his irregular hours of work. By Defendant's reasoning, since most banks are open only five days a week, a bank examiner's workweek is analogous to that of field employees who are given their scheduled two days off (and therefore have a five-day workweek). Since *Boll* found the bank examiners' hours to be irregular, Defendant argues that its employees' regularly scheduled two days off should likewise be counted in determining irregularity. This Court does not reach that result from *Boll*.[2]

In *Boll*, an assistant bank examiner contended that because his employer established the schedule of banks to be examined at the beginning of each year and determined several months in advance which individuals were to examine particular banks, the hours of work varied from week to week at the discretion of the employer, and therefore the *Belo* exception was inapplicable. The court found § 778.405, 29 C.F.R. of the Department of Labor Interpretive Bulletin, which excludes from the calculation or irregular hours those weeks "where the employee works an irregular number of hours according to a predetermined schedule," to be a reasonable interpretation of the

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[2] Even if *Boll* could be read to support Defendant's position, this Court is bound by precedent established by the Fifth Circuit in *Foremost Dairies* and its progeny, which support the opposite conclusion.

Act. 365 F. Supp. at 644. It nevertheless denied the employee's claim:

> [W]hile the examination of banks was scheduled ahead of time, the number of hours that would be required to complete an examination was not known by the defendant. Although defendant would obviously know that the examination of a large bank would probably require more time than the examination of a smaller bank, the number of hours the assistant examiners would work during a particular examination could not be controlled by defendant nor could the number of hours they would work be anticipated with any degree of certainty. *Thus, the number of hours plaintiff worked per week were not the result of the discretion of defendant nor were they ascertainable from the schedule of the order in which the banks would be examined.* Plaintiff's duties necessitated irregular hour of work.

Id. at 645 (emphasis added). Unlike the employer in *Boll*, Defendant's scheduled two days off for its employees was the result of its discretion. The timing of the days off could be anticipated with reasonable certainty and, by Defendant's own admission, the days off fell at all days of the week irrespective of the work load.

In summary, the weeks under 40 hours in which an employee was allowed his scheduled two days off were properly excluded from Mr. Ray's calculations and schedules. These schedules show that only a very few weeks in 1977 to 1979 were fluctuations below 40 hours dictated by lack of work as opposed to being dictated by the employer's control of the work hours. Following the Fifth Circuit in *Donovan* v. *Brown Equipment & Service Tools, Inc.* and *Foremost Dairies, Inc.* v. *Wirtz*, this Court finds as a matter of law that Defendant failed to

show the kind of irregularity in non-overtime hours necessary for the valid use of a *Belo* plan. Accordingly, Plaintiff's motion for partial summary judgment is hereby GRANTED and Defendant's motion for partial summary judgment is hereby DENIED.

DONE at Laredo, Texas, this 23rd day of August, 1982.

/s/ George P. Kazen
United States District Judge

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